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L.B. Foster Company A Pennsylvania Corporation v. Nelson Brothers Construction Company, A Utah Corporation, and Industrial Indemnity Company, A Corporation : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

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Clerk, Supreme

L. B. FOSTER COMPANY, a Pennsylvania Corporation,
Plaintiff and Respondent,

— vs. —

NELSON BROTHERS CONSTRUCTION COMPANY, a Utah Corporation, and INDUSTRIAL INDEMNITY COMPANY, a Corporation,
Defendants and Appellants.

Case No.

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE STEWART M. HANSON, *District Judge*

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IN THE SUPREME COURT OF THE STATE OF UTAH

L. B. FOSTER COMPANY, a Pennsylvania Corporation,
Plaintiff and Respondent,

— vs. —

NELSON BROTHERS CONSTRUCTION COMPANY, a Utah Corporation, and INDUSTRIAL INDEMNITY COMPANY, a Corporation,
Defendants and Appellants.

Case No. 10613

RESPONDENT'S BRIEF

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THIS COURT.

STATEMENT OF KIND OF CASE

This is an action by the plaintiff, who was a material supplier of a Subcontractor, to recover for materials furnished and used in the construction of a portion of Interstate Highway I-15, located in North Lehi, Utah.

The Subcontractor was Bountiful Materials & Construction Company, hereinafter referred to as "Bomaco."

The General Contractor was Nelson Brothers Construction Company, hereinafter referred to as the "defendant Nelson Brothers."

DISPOSITION BY LOWER COURT

This case was tried by the Court without a jury in the District Court of Salt Lake County. The Court found the issues in favor of the plaintiff.

Said the Court:

> "That the plaintiff is entitled to recover under the Indemnity and Guaranty Agreement introduced in evidence, (Ex. P-1) and that the plaintiff is entitled to a judgment for the amount prayed for, plus attorneys' fees as provided by the Bar Schedule." (R. 49)

There was no issue on the amount owing to plaintiff for materials furnished ($2,752.90), since this sum was agreed at the Pre-Trial conference.

Plaintiff and defendant also agreed to abide by the Bar Schedule for the assessment of attorneys' fees (R. 43). Accordingly, judgment was entered for plaintiff for the sum of $2,752.90, plus $363.83 interest, plus $620.94 attorneys' fees, and plus costs of court (R. 53).

STATEMENT OF FACTS

Plaintiff (Respondent), as the prevailing party below, is entitled to the benefit of a review of the evidence in the light most favorable to it. We shall not attempt here to set forth all of the evidence bearing on each issue of fact.

Plaintiff's statement, however, is intended to demonstrate that the Court's Memorandum Decision (R. 49) and the Findings of Fact and Conclusions of Law, are amply supported by competent evidence, and that the Judgment represents a just determination of the controversy.

Defendant, Nelson Brothers Construction Company, was awarded a General Contract by the State of Utah to construct Highway Project No. IG-15-6 (20)-277-3rd North, Lehi, Utah (Ex. P-1). In connection therewith defendant Nelson Brothers entered into a Subcontract with BOMACO, Inc., wherein BOMACO agreed to furnish and install approximately 1,790 lineal feet of aluminum guard railing for said Interstate Project (Ex. P-4). BOMACO in turn purchased the said aluminum railing from the plaintiff and used it in the performance of its Subcontract with the defendant Nelson Brothers. After BOMACO became unable to pay, plaintiff brought this action to recover from defendant Nelson for the materials furnished and used on Nelson's Construction Project.

Mindful of the precarious financial position of BOMACO, plaintiff wrote to defendant from Los Angeles, California, on June 10, 1963, as follows:

> "Nelson Brothers Construction Company
> 347 West 16th South
> Salt Lake City, Utah
>
> Subject: Project #IG-15-6(20)277 3rd Contract North Lehi, Utah
>
> Gentlemen:
>
> We have been requested by your Subcontractor, Bountiful Materials and Construction

Company, to furnish aluminum bridge rail materials in connection with your State Contract, Project No. 1G-15-6(20)277-3rd Contract, North Lehi, Utah.

In consideration of our delivering aluminum bridge rail to Bomaco, Inc., on your jobsite, we ask that you guarantee payment of our invoice in accordance with the terms of your Subcontract with Bomaco, Inc., *and that we be afforded protection under your bond.*

Your consideration in executing and returning one copy of this letter to us in the self-addressed envelope will be very much appreciated. Should you have any questions, please call the undersigned collect.

Very truly yours,

L. B. FOSTER, INC.
By /s/ K. D. McClelland
K. D. McClelland

Agreed as above.
NELSON BROTHERS CONSTRUCTION COMPANY
By /s/ Reuben G. Skogerboe
Reuben G. Skogerboe, Superintendent
Date: October 17, 1963''

(Ex. P-1) (Emphasis supplied)

The lower court awarded judgment to the Plaintiff, L. B. Foster Company, on the basis of this said letter agreement.

ARGUMENT

POINT I.

THE COURT'S RULING THAT PLAINTIFF WAS NOT TRANSACTING BUSINESS WITHIN THE STATE OF UTAH WHICH WOULD REQUIRE REGISTRATION UNDER THE BUSINESS CORPORATION ACT WAS AMPLY SUPPORTED BY THE EVIDENCE.

This Court has spoken many times on the subject of what constitutes "doing business" in Utah by a foreign corporation.

On the subject of "doing business," the facts, simply stated, are these: Bomaco, defendant's Subcontractor, placed its order for aluminum bridge railing from plaintiff for the North Lehi Project by telephone to plaintiff's Los Angeles office (R. 126). Plaintiff in response to the order had the bridge railing shipped from Pittsburgh Pennsylvania (R. 16) and Carnegie, Pennsylvania (R. 19) to Bomaco's yard in Salt Lake City, Utah, in care of defendant Nelson. There is no dispute that all of the materials ordered by Bomaco for this said highway project were shipped from states other than Utah (R. 100).

Plaintiff's salesmen infrequently solicited orders in Utah -- only two or three times a year (R. 91). Plaintiff did not maintain agents or dealers in Utah nor did Plaintiff have an office or need for an office in the State of Utah (R. 125). Plaintiff had nothing to do with the installation of said materials after they were shipped to the job (R 101), but did prepare shop drawings and did fab-

ricate the railing in Pittsburgh for delivery to the North Lehi Construction Project (R. 101).

Defendant Nelson urges that some sheet piling stored in Utah places plaintiff in the position of Qualification and Registration. None of the said piling stored in Utah was used on the North Lehi Project, and Shurtleff & Andrews, with whom the said piling was stored for the convenience of general contractors, was in fact an independent contractor (R. 109). The record, however, is clear that almost all of the piling was shipped into the State of Utah or through the State in Interstate Commerce (R. 111, 112).

Defendant Nelson's, witnesses testified at R. 145 and 146, that the sheet piling was received from outside Utah, and shipments were made to states other than Utah. Again, at R. 153, defendant Nelson's witness stated, that of a total of seventeen transactions, thirteen were "shipped out of state or received from out of state, and four were shipped to or received within the state."

In addition to the interstate shipment of piling to independent contractors Shurtleff & Andrews and to F. & B. Truck Lines, it should be noted that plaintiff deals in rails, splice bars, bolts, nuts, spikes, frogs, switches, tie plates, rail braces, track, tools, all kinds of piping, H-Bearing, pipe piling, marine fenders, rubber dock fenders, pump cells, highway signs, none of which are stored in the State of Utah nor sold through dealers or agents in the State of Utah (R. 141, 163, 164).

Defendant Nelson does not attack the validity of the agreement between plaintiff and Bomaco for the materials ordered and consumed on its job, but rather at page 12 of its brief urges "this court to uphold states' rights to compel compliance and *should deny access to the courts in this case.*" (Emphasis added)

Moreover, defendant Nelson does not contend the Indemnity Agreement (Ex. P-1) was either void or voidable for want of plaintiff's qualification in Utah.

Even so, the facts support the Interstate nature of plaintiff's business in Utah. Upon these facts, the court below followed the decision of *East Coast Discount Corporation* v. *Reynolds,* 7 Utah 2d 362, 325 Pac. 2d 853. And the Court had this case clearly in mind at the trial of this said action. See the Court's comment with reference to this *East Coast Discount Corporation case* at Page 110 of the record.

With reference to what constitutes doing business within the meaning of the Constitution of Utah, Article X, Section 9, see *Marchant* v. *National Reserve Company of Utah*, 103 Utah 530, 137 Pac. 2d 332.

Activities *not* considered to be transacting business within the State of Utah are set forth in 16-10-102, Utah Code Annotated, under the Business Corporation Act. Among these are:

(a) maintaining or defending any action or suit . . . (c) effecting sales through independent contractors (such as the sales transacted through Shurtleff & Andrews and

R & B Trucking Company relating to piling only); (f) soliciting or procuring orders, whether by mail or through employees or agents, or otherwise, where such orders require acceptance without this State before becoming binding contracts (plaintiff did not have an office or an agency in the State of Utah for the purpose of accepting orders in this State); (i) transacting any business in Interstate Commerce. (Practically all of the business transacted by plaintiff in Utah was Interstate, and the materials ordered from plaintiff was shipped in Interstate Commerce.)

In the case of *Parke Davis & Company* v. *Fifth Judicial District Court*, 93 Utah 217, 72 Pac. 2d 466, the Court ruled:

> "The soliciting of orders for goods by salesmen of foreign corporation and the shipment of goods into State pursuant to such orders, are in Interstate Commerce and do not constitute doing business within the State of Utah."

See also *East Coast Discount Corporation* v. *Reynolds*, 7 Utah 2d 362, 325 Pac. 2d 853, in which the Court held that a foreign corporation which entered into contracts with dealers in the State of Utah which required it to send guarantees to consumers, advertised through circulars, shared newspaper advertising expense, furnished advertising matter, and send an agent when requested, to assist the dealer in sales, was not "doing business" for purposes of the statute; since these acts were incidental to the entire Interstate character of contracts.

The bringing of a suit by a foreign corporation to secure its legal rights is not "doing business" in the State of Utah. See *George R. Barse Livestock Company* v. *Range Valley Cattle Company,* 16 Utah 59, 50 Pac. 630; *Home Brewing Company of Chicago Heights* v. *American Chemical and Ozokerite Company,* 58 Utah 219, 198 Pac. 170; *General Motors Acceptance Corporation* v. *Lund,* 60 Utah 247, 208 Pac. 502.

Defendant Nelson for "doing business" relies on the case of *Mud Control Laboratories* v. *Covey,* 2 Utah 2d 85, 269 Pac. 2d 854. In this case, the Court construed 16-8-3 Utah Code Annotated (1953), setting out the disabilities of a non-complying foreign corporation. Defendant Nelson, apparently overlooked the fact that 16-8-3 was repealed by the Legislature in 1961, when the Utah Business Corporation Act was enacted. It should be noted, however, that in the *Mud Control Case,* contrary to the facts in the instant case, the materials sold by Mud Control were shipped into Utah and were there disbursed by Mud Control. The Utah Business Corporation Act 16-10-102 liberalizes the registration requirements of foreign corporations, and specifically classifies the exemptions which come within the facts of this case. See also *East Coast Discount Corporation* v. *Reynolds,* supra, in which the Court said:

> "... Merely entering into contracts requiring foreign corporations to perform within state acts, which were part of and incidental to entire Interstate character of contracts did not constitute doing business for purposes of statute."

To set the record straight defendant's voluntary statement at page 12 of its brief must be answered. De-

fendants' statement is quoted as follows: "*Presumably*, a substantial sum has accrued to the State of Utah and to the County of Salt Lake for license taxes, sales taxes from sales and lease transactions conducted in the State, income taxes from the income derived from said sales and rentals, and the property taxes on inventory maintained in the State." At page 129 of the record, plaintiff's representative testified that he did *not* know whether the company paid inventory, income or sales tax in Utah. Defendant Nelson's counsel, it would appear, deliberately injected an assumption which this Court in its judicious wisdom will denounce. Even though the subject of taxes is entirely irrevelant to the issues in this case, it would seem that the proper forum for defendant Nelson to make its charge or complaint, if it has one, is the State Tax Commission of Utah. Defendant did not produce any evidence as to whether or not plaintiff paid taxes in the State of Utah.

In conclusion and in defense of defendant Nelson's plea that the plaintiff should be denied access to the Courts in Utah, we refer to 16-10-102 (a) Utah Code Annotated, Utah Business Corporation Act, which specifically permits maintaining or defending any action or suit or administrative or arbitration proceeding, or affecting the settlement thereof, or the settlement of claims or disputes without having to register in the State of Utah.

POINT II.

THE COURT DID NOT ERR IN HOLDING THAT DEFENDANT, NELSON BROTHERS CONSTRUCTION COMPANY, WAS INDEBTED TO PLAINTIFF UNDER COUNT II OF PLAINTIFF'S COMPLAINT.

Defendant Nelson's argument to this point turns on the authority of its superintendent Reuben Skogerboe, to bind the defendant on an Indemnity-Guaranty Agreement (Ex. P-1, supra).

Having received the benefit of the materials furnished and used on its construction project, defendant Nelson, for the first time and only after the law suit was filed, took the position that Skogerboe had no authority to bind the defendant, Nelson Brothers. The Court properly concluded that Superintendent Skogerboe had the necessary authority, based upon the following:

1. Plaintiff's (L. B. Foster) letter, dated June 10, 1963 (Ex. P-1), was transmitted to defendant (*Nelson Brothers Construction Company*), requesting indemnification and protection under defendant Nelson's bond on Project IG-15-6 (20)277-3rd Contract, North Lehi, Utah. Defendant Nelson referred this letter to its superintendent, Reuben G. Skogerboe, who in turn signed the document (R. 95), (R. 114, 115, 117), on October 17, 1963, and forwarded the original to Plaintiff, L. B. Foster Company. It should be noted that Skogerboe signed the letter as "superintendent," and

not as "Job Superintendent." By referring this letter (Ex P-1) to Skogerboe for action defendant conferred upon Skogerboe the authority to act.

2. On April 28, 1964, plaintiff, (Foster) wrote to defendant (Nelson Brothers) (Ex. P-2) again requesting payment on said job, and a copy of this letter was directed to one of the principals in the company, Mr. Orrin A. Nelson. Here again, Nelson Brothers referred this letter to Reuben Skogerboe, Superintendent, who replied:

> "Payment of materials on this contract has not been received by us yet, payment should be received by us approximately May 20, 1964. We will pay this to you and Bomaco jointly. Payment has just been received by us for material on the North Lehi Project, so IG-15-6 (20) 277 this will be mailed immediately. Sincerely yours, Reuben Skogerboe, Superintendent." (Ex. P-2)

3. Exhibit P-3 is a telegram from this same Reuben Skogerboe stating that defendant, Nelson Brothers, will execute a Standard Sheet Piling Rental Agreement (R. 96, 97).

4. The Subcontract Agreement between defendant Nelson and Bomaco (Ex. P-4), was signed by Reuben G. Skogerboe, Superintendent, for and on behalf of Nelson Brothers Construction Company (R. 97). Also Ex. P-5 was referred to Skogerboe (R. 118).

5. Reuben G. Skogerboe, Superintendent, wrote to Bomaco on October 21, 1963 with reference to this said North Lehi Construction Project, in which he states that:

> ". . . I am returning one set of drawings. These drawings do not have to be approved by the State, to do so now it would delay the project to such an extent you could not supply the material on time for delivery. The State only requires a Certificate of Compliance with plans and specifications, plus a sample of handrail 2-feet long." (Ex. P-7)

Would the Court need more to prove Skogerboe had more than just superficial perfunctory jurisdiction of defendant Nelson's affairs?

6. On December 22, 1964, the firm Clyde, Mecham & Pratt wrote to Emery Nelson of Nelson Brothers Construction Company, referring to the said Indemnity Agreement of June 10, 1963. There was no answer received to this letter, denying Skogerboe's authority to sign the letter of June 10, 1963 on behalf of Nelson Brothers Construction Company (R. 27).

7. In answer to an interrogatory at R. 29:

> "Q. Did the defendant, Nelson Brothers Construction Company, have a Subcontract with Bountiful Materials & Coustruction Company."

Emery G. Nelson of defendant Nelson Company answered as the Secretary of the Corporation that a written Subcontract was in existence and

furnished a copy of said Subcontract with the Answers to Interrogatories at R. 31. It is noted that Skogerboe signed this document as "Superintendent" for defendant Nelson, and that Nelson did not deny Skogerboe's authority to sign said Subcontract document, and moreover the materials furnished by plaintiff for performance of said Subcontract were used on the job (R. 98) and (R. 113).

8. Attached to defendant Nelson Company's Answer to Interrogatories, Emery G. Nelson, Secretary of defendant Nelson attached checks paid on said Subcontract for the materials furnished by L. B. Foster Company through Bomaco. These checks show part payment of the account on the Subcontract executed by Reuben Skogerboe (Attached to R-31).

9. On September 28, 1964, defendant Nelson wrote to plaintiff, stating that as of this date, we have paid our Subcontractor, Bountiful Materials & Construction Company, $10,152.00 on the subject contracts. This represents 90 per cent of the amount owed to them. The writer of this letter stated:

> "We appreciate your informing us of the unpaid balance of Bomaco's account, and will exert any pressure we can in getting them to make payment at the earliest date possible. When we receive final paymnt from the State, we will make a check in the amount of *$1,128.00 payable to both you and Bomaco* so

that you will be assured of receiving the final amount owed to Bomaco by us." (Emphasis added)

There is no indication in this said letter at R. 38, that defendant Nelson Company denies the authority of Reuben Skogerboe to enter into the Subcontract Agreement with Bomaco. Moreover, defendant Nelson Brothers states it will pay the $1,128.00, *which has not been done to date and it is holding this sum contrary to the statement in this said letter of 28 September 1964.* See R. 162, where Emery Nelson states defendant Nelson is holding $1,128.00. See also R. 39, in which Bomaco, Inc., by a letter dated October 30, 1964, authorized defendant (Nelson Brothers) Attention: Mr. Emery Nelson, to pay $1,282.50 to L. B. Foster and Bountiful Material & Construction Company by a joint check. And, in answer to the Demand for Admissions at R. 40, defendant (Nelson Brothers) admitted that the letter of September 28, 1964, signed by Owen J. Lunt on behalf of defendant Nelson is genuine, and that Bomaco's letter, dated October 30, 1964, was received by defendant Nelson Brothers.

10. Defendant Nelson stipulated at pages 79 and 80 of the record that Reuben Skogerboe signed the Subcontract Agreement with Bomaco and that Skogerboe was a Superintendent prequalified as such with the State of Utah (R. 81).

11. Plaintiff, at no time ever received information from defendant Nelson that Reuben G. Skogerboe did not have authority to sign the Indemnity Agreement identified as Exhibit P-1 (R. 93).
12. Reuben Skogerboe testified that he had supervision of defendant Nelson's work and coordination of the work by general contractors and was an expediter of materials on the job (R. 121). In this capacity he expedited materials furnished by plaintiff.
13. Emery Nelson testified at R. 155, that Skogerboe had authority to negotiate the terms of Subcontracts (R. 159).
14. The Subcontract Agreement signed by Skogerboe was submitted to the State Road Commission by defendant Nelson, as being completely bona fide, and Nelson Brothers did not renounce this said Sub-contract because of the authority of Skogerboe (R. 161).

"The liability of the principal (defendant Nelson) to a third person (plaintiff, Foster) upon a transaction conducted by an agent (Skogerboe) may be based upon the fact that (a) agent was authorized; (b) the agent was apparently authorized; or (c) the agent had a power arising from the agency relationship, and not dependent upon an authority or apparent authority." (*Restatement of the Law of Agency*, Sec. 140.)

"Although an agent or apparent agent does not under the rules stated in Section 144-211 (disclosed or

partially disclosed principal) have power to bind his principal in a particular transaction, the transaction may nevertheless subject the principal to liability or to the loss of his interests where: (a) The principal has misled or has failed to undeceive the third person; (b) the principal has benefited from the transaction." . . . (*Restatement of the Law of Agency*, Sec. 141.)

"Upon ratification with knowledge of the material facts, the principal becomes responsible for contracts and conveyances made for him by one purporting to act on his account as if the transaction had been authorized, if there has been no supervening loss of capacity by the principal, or change in the law which would render illegal the authorization or performance of such a transaction." *Restatement of the Law of Agency*, Sec. 143.)

"A disclosed or partially disclosed principal is subject to liability upon contracts made by an agent acting within his apparent authority, if made in proper form and with the understanding that the apparent principal is a party. (*Restatement of the Law of Agency*, Sec. 159.)

POINT III.

THE COURT DID NOT ERR IN GRANTING PLAINTIFF A REASONABLE ATTORNEY'S FEE IN CONNECTION WITH COUNT II OF THE COMPLAINT.

Plaintiff served notice upon the defendants on the 8th day of March, 1966, that plaintiff would ask the Court to amend the Pre-Trial Order at the commencement of the trial on March 11, 1966.

Since the issue of attorneys' fees under Count II revolved upon an interpretation of the Indemnity Agreement, and its relation to 14-1-8, Utah Code Annotated, the Court saw no prejudice to defendant Nelson, in permitting the amendment. Defendants did not interpose an objection to the Motion to Amend until the morning of the trial.

Obviously, the Court, under Rule 54 (c)(1), could have awarded attorneys' fees even though plaintiff had not proposed an amendment to the Pre-Trial Order. This said rule provides that ". . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. . ."

The Court awarded attorneys' fees to plaintiff on the Indemnity Agreement (Ex. P-1), which provided:

> "In consideration of our delivering aluminum bridge rail to Bomaco, Inc. on your jobsite, we ask that you guarantee payment of our invoice . . . *and that we be afforded protection under your bond.*" (Emphasis added)

Protection under the bond allows statutory attorneys' fees — the Court reasoned that the Indemnity Agreement granted nothing less to the plaintiff than the attorneys' fees allowable by statute under defendant Nelson Brothers' bond.

POINT IV.

THE COURT DID NOT ERR IN REFUSING TO AWARD A REASONABLE ATTORNEYS'

FEE TO DEFENDANT, INDUSTRIAL INDEMNITY COMPANY.

Defendant, Industrial Indemnity Company, represented by the same counsel, misconstrues 14-1-8. Attorneys' fees are awarded to the party bringing the action, if he wins, and not to the party who does not bring the action, if he wins. If the party bringing the action loses, he gets no attorneys' fee.

The prevailing party in the action was the plaintiff, and not the defendant, Industrial Indemnity Company. Assume for argument, plaintiff won on Count I and on Count II — would the Court have awarded attorneys' fees to plaintiff on both Counts — obviously not. And, too, attorneys' fees are taxed as costs under Rule 54(d)(1) to the prevailing party, *unless the Court otherwise directs.* Here, the prevailing party who brought the action was plaintiff, and the Court so directed the attorneys' fees. The matter of attorneys' fees was completely and exhaustively argued to the Court and the Court, acting within its discretion, awarded same to the prevailing plaintiff.

CONCLUSION

The judgment of the lower court is supported by the evidence and the law and should be affirmed.

Respectfully submitted,

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